UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CHRISTINE DUPUIS, Personal Representative of the Estate of Mary L. Powers, Plaintiff v. CANCER SCREENING SERVICES, Defendant	Civil No. 96-169-P-C

GENE CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER
DENYING DEFENDANT'S MOTION TO DISMISS OR STAY

The Court now has before it Defendant's Motion to Dismiss or Stay. Defendant moves for dismissal or stay on the basis of lack of subject matter jurisdiction, failure to state a claim, and failure to join the necessary parties under Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 12(b)(7). The Court disagrees with Defendant's arguments and will deny its motion.

FACTS

Christine Dupuis is the Personal Representative of the Estate of Mary Powers, a Maine resident who died in June of 1995 as a result of cervical cancer. From 1991 through 1993, Ms. Powers provided four pap smears, all of which were sent by local health care providers to Defendant Cancer Screening

Services, a California laboratory, for evaluation.[1] Defendant laboratory evaluates tissue samples and reports on the results. Plaintiff alleges that Defendant negligently evaluated Ms. Powers' pap smears and reported incorrect results. Ms. Powers' cervical cancer was diagnosed in 1994, at which time it was determined to be incurable. Plaintiff complains against Defendant under numerous legal theories: negligent performance of an undertaking (Count I), breach of contract (Count II), negligent misrepresentation (Count III), negligent infliction of emotional distress (Count IV), and wrongful death (Count V).

DISCUSSION

A motion to dismiss is designed to test the legal sufficiency of the complaint and, thus, does not require the Court to examine the evidence at issue. Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985). The Court accepts all well-pleaded facts as true, "indulging every reasonable inference helpful to the plaintiff's cause." Garita Hotel Ltd. Partnership v. Ponce Federal Bank, F.S.B., 958 F.2d 15, 17 (1st Cir. 1992). The Court may grant Defendant's Motion to Dismiss "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52 (1st Cir. 1990).

[1]The Court's subject matter jurisdiction is based on diversity of citizenship. Ms. Powers was a resident of Maine, and the estate is being probated in Franklin County, Maine. Defendant is a California corporation. In addition, Plaintiff alleges more than $50,000 in damages.

A. Rule 19

Defendant asserts that Plaintiff has failed to join necessary parties to this action. Specifically, Defendant argues that the decisions regarding when pap smears were to be taken, how they were taken, preparation and collection of the specimens, review of the results, correlation of the results with the patient's history and other clinical data, and reporting the results to the patient, were all done by medical personal unaffiliated with the Defendant laboratory. The slide interpretations Defendant performed in California, Defendant suggests, were "an integral part of the overall provision of health care services" to Ms. Powers. Defendant's Memorandum of Law in Support of Motion to Dismiss or Stay (Docket No. 3) at 6. Nevertheless, Defendant asserts that because Defendant's laboratory services were only part of the health care services provided to Ms. Powers, other parties need to be joined for a full and fair determination of the controversy in this matter.

The Court assumes that, among possible others, Defendant desires to join Southern Coastal Family Planning, Inc./Planned Parenthood of Northern New England of Brunswick, Maine -- the organization to which Defendant reported the results of Ms. Powers' pap smears. Defendant alleges that because these others must be joined under Rule 19 and their joinder would defeat the jurisdictional requirement of complete diversity, the Court must dismiss this case under Rule 12(b)(1) and 12(b)(7). Defendant argues that the inquiries set out in subsection (a) of

Rule 19 should guide the Court in making the joinder determination. Rule 19, governing joinder of indispensable parties, states in pertinent part:

> (a) **Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest....
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> (b) **Determination by Court Whenever Joinder not Feasible.** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court to include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by way of shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19.

In the initial clause of the first sentence of Rule 19, subsection (a) specifies in the conjunctive two threshold requirements for determining whether a person should be joined if feasible; i.e., that person must be subject to service of process and his joinder must not defeat subject matter jurisdiction. The

rule then goes on in (a)(1) and (a)(2) to list two additional disjunctive requirements. Read literally, subsection (a) indicates that a person whose joinder would defeat jurisdiction is not a "person to be joined if feasible" since the conjunctive requirements of availability of service and continued subject matter jurisdiction are not satisfied. In this case, where it is asserted by Defendant that subject matter jurisdiction is defeated by the additional parties, it is unnecessary to examine the additional requirements specified in (a)(1) and (a)(2). Assuming, as the Court has, that joinder of the other parties would destroy diversity jurisdiction, the Court must look to Rule 19(b) in order to determine whether the action should proceed in the absence of those parties, or if they are "being ... regarded as indispensable" thus requiring the action to be dismissed.[2] Acton Co., Inc. of Massachusetts v. Bachman Foods, Inc., 668 F.2d 76, 80 (1st Cir. 1982); Potomac Electric Power Co. v. Babcock & Wilcox Co., 54 F.R.D. 486, 490 (D. Md. 1972)("Under Rule 19(a), Royal would appear to be a person whose joinder would in fact deprive the Court of [diversity] jurisdiction.... Accordingly, Royal is a person as described in subdivision (a)(1)-(2) hereof [which] cannot be made a party, and the inquiry in this case must be made under subdivision (b) to determine whether the action

[2]The four-factor analysis mandated by Rule 19(b) overlaps, to a large extent, with that required by Rule 19(a). However, unlike Rule 19(a), Rule 19(b) provides for a pragmatic weighing of the relevant factors. Provident Tradesmens Bank & Trust v. Patterson, 390 U.S. 102, 109 (1968); Bio-Analytical Services v. Edgewater Hospital, 565 F.2d 450, 452 (7th Cir. 1977).

should proceed with Royal dropped or should be dismissed."); A. Wright, Federal Courts 499 (5th ed. 1994)("If the absentee is needed for just adjudication and ... his joinder would destroy diversity, Rule 19(b) states the factors to be considered in deciding whether to proceed in his absence or to dismiss the action.").

In its brief, Defendant fails to specify, and the Court is unable on the existing record to determine, who all of the indispensable parties are or what role each played in Ms. Powers' medical care. Plaintiff has narrowly tailored her Complaint, focusing on the negligence of the Defendant laboratory. With the exception of Southern Coastal Family Planning, Inc./Planned Parenthood of Northern New England, the other possible parties are not named, and factual details regarding their role in Ms. Powers' medical care are not known. The Court does not have the requisite information with which to analyze the four factors listed in Rule 19(b). Since the joinder issue is unresolvable at this stage in the case, the Court will deny Defendant's Motion to Dismiss on this ground. At this time, the Court will retain jurisdiction over the subject matter on the basis of complete diversity between the parties.

B. Application of the Maine Health Security Act

Claims for "professional negligence" in Maine are governed by the Maine Health Security Act, 24 M.R.S.A. § 2501 et seq. Defendant contends that this is such an action and that the Law Court's decision in Powers v. Planned Parenthood of Northern New

England, 677 A.2d 534 (Me. 1996), establishes with collateral estoppel effect that this case is within the Health Security Act.

A prior judgment may be used for purposes of collateral estoppel only if the identical factual or legal issue was necessarily decided by a prior final judgment, and the party estopped had a fair opportunity and incentive to litigate the issue in a prior proceeding. Mutual Fire Ins. Co. v. Richardson, 640 A.2d 205, 208 (Me. 1994)(quoting State Mut. Ins. Co. v. Bragg, 589 A.2d 35, 37 (Me. 1991)). After a careful review of the Law Court's opinion in Powers v. Planned Parenthood of Northern New England, the Court concludes that no judgment or fact has necessarily been decided against Plaintiff or Ms. Powers which would collaterally estop Plaintiff from bringing an action against this Defendant outside the Maine Health Security Act. In Powers, the Maine Law Court affirmed the Superior Court order granting Ms. Powers' petition to perpetuate testimony pursuant to Maine Rule of Civil Procedure 27. Plaintiff explains that this issue arose because Ms. Powers needed to give her deposition testimony before her action could be filed because her death was imminent. Objection to Defendant's Motion to Dismiss or Stay with Incorporated Memorandum of Law (Docket No. 4) at 8. In permitting the testimony to be perpetuated, the Law Court stated in passing that an action could not be brought until the medical screening process was completed. That statement is true as to some of the defendants in that action. The specific issue of whether an action against a clinical laboratory is governed by

the Health Security Act was not litigated. To the extent that the Law Court addressed the issue at all, it did so unnecessarily in rendering a judgment in favor of Ms. Powers. See 18 Wright, Miller and Cooper, Federal Practice and Procedure § 4421, at 192 and 200 (1981)(stating that issue preclusion does not attach to determinations unnecessary to the judgment).

The Court must now determine if the Act applies to this Defendant. The Maine Health Security Act governs actions for professional negligence, which the statute expressly defines as an act or omission constituting a deviation from the applicable standard of care "by the health care practitioner or health care provider" that proximately causes the injury. 24 M.R.S.A. § 2502(7). In order for the Act to apply to this action against this Defendant, the Court must conclude that the Defendant is a "health care provider" or a "health care practitioner" within the language of the Act. Defendant does not address which provision of the statute applies to it. The Court will consider both sections.

Section 2502(1) defines "health care practitioner" for purposes of the Health Security Act as:

> physicians and all others certified, registered or licensed in the healing arts, including, but not limited to, nurses, podiatrists, optometrists, chiropractors, physical therapists, dentists, psychologists and physicians' assistants.

24 M.R.S.A. § 2502(1-A). The Court concludes that this portion of the statute is not applicable because the nonexhaustive list of professionals described as health care practitioners does not

include any type of corporate entity such as the Defendant laboratory.

The Court next inquires into whether Defendant fits the definition of a "health care provider." Section 2502(2) defines a "health care provider" for purposes of the Health Security Act as:

> any hospital, clinic, nursing home, or other facility in which skilled nursing care or medical services are prescribed by or performed under the general direction of persons licensed to practice medicine, dentistry, podiatry, or surgery in this State and which is licensed or otherwise authorized by the laws of this State.

Clinical laboratories are not included in the list of persons and facilities set forth in the statute. Along with mentioning several individual fields of endeavor, the list also mentions three types of facilities: hospitals, clinics, and nursing homes. Clinical laboratories are not specifically designated. There is nothing in the nature of hospitals, clinics, or nursing homes which suggests that clinical laboratories, though not mentioned, should nevertheless be included in the statute. Unlike hospitals, clinics, or nursing homes, the Defendant clinical laboratory has no direct contact with patients when it evaluates tissue samples and reports on the results. This type of evaluation and reporting is not "medical services." Rules of liberal construction cannot properly be applied to rewrite a statute in order to alter what it actually says. Defendant laboratory does not fit either definition and, therefore, it is

not governed by the terms of the Act.[3]

Finally, Defendant contends that by joining Defendant in a "Notice of Claim" now pending before the Maine Superior Court, Plaintiff has made a binding election of remedies. This Court disagrees. There is a difference between alternative pleading and the election of remedies. An election of remedies requires that a remedy have been awarded. The election of remedies is not binding until it has been pursued to judgment. See 5 Wright and Miller, Federal Practice and Procedure § 1283 (1990)(discussing ability of litigant to seek inconsistent remedies). There is no evidence in the record on this motion which establishes that either Ms. Powers, or the Plaintiff, has pursued any remedy to judgment, or obtained any recovery on any claim against any party. Therefore, the Court concludes that no remedy has been elected.

[3]Defendant specifically contends that Plaintiff's claims relating to the alleged misreading of the October 1991, February 1992, and November 1992 slides must be dismissed as barred by the Act's three-year statute of limitations or, alternatively, the Court should stay any remaining claims until the prelitigation screening requirements of the Act have been met. The Maine Health Security Act includes provisions for mandatory prelitigation screening by a panel, 24 M.R.S.A. §§ 2851-2859, and a three-year statute of limitations, 24 M.R.S.A. § 2902. However, it is not necessary for the Court to address these arguments because of the within determination that the Health Security Act does not apply to this case.

Accordingly, it is ORDERED that Defendant's Motion to Dismiss or Stay be, and it is hereby, DENIED.

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GENE CARTER
District Judge

Dated at Portland, Maine this 13th day of February, 1997.